No. 88-1771

(5)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

JOSEPH A. BONJORNO, LORRAINE KERR,
(EXECUTRIX OF THE WILL OF GEORGE M. KERR, JR.,)
AND BARBARA K. CLISBY,

Cross-Petitioners,

v.

KAISER ALUMINUM & CHEMICAL CORPORATION
and KAISER ALUMINUM & CHEMICAL SALES, INC.,

Cross-Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF FOR CROSS-PETITIONERS ON THE MERITS OF PLAINTIFFS' CROSS-PETITION

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STATEMENT OF QUESTIONS PRESENTED BY PLAINTIFFS – APPELLANTS BELOW

1. *Time Period Of Interest*: Should not the *time period* for interest on a judgment run from the date of the original judgment (when defendants' liability was established), where subsequent recalculation of damages (at defendants' request) does not include any adjustment or increment to account for the time value of money for any period after the original judgment?

Thus, in this antitrust action in which Plaintiffs in 1979 established defendants' liability under the antitrust laws for destroying their business in the early and mid-1970's, did not the Court of Appeals err in denying Plaintiffs 2-1/2 years of interest on their $9,567,939 judgment, by limiting interest to the period from the date when Plaintiffs' damages were finally recalculated upwards, instead of from when liability was fixed for the first and only time?

2. *Rate of Interest*: Did not the Court of Appeals, in setting the *rate of interest* have the power (inherent, equitable and under Fed. R. App. P. 37) to award interest at commercial free market rates (monthly average prime, compounded monthly) sufficient to cover the actual diminution in the value of the judgment over the period of post-trial and appellate delay?

Did not the Court of Appeals err in applying the statute for mandatory interest in routine execution on federal district court judgments, 28 U.S.C. §1961, as amended, which provides only for fixed Treasury Bill rate (2 to 3 points below prime), and compounded only annually? – and where, over the ten years of post-trial and appellate delay, the shortfall to the injured Plaintiffs and

the windfall to the wrongdoing Defendants, between market rate ($18.6 million) and 28 U.S.C. § 1961 ($11.9 million), amounts to $6,676,727 or 35.8% of the market rate interest.

LIST OF PARTIES AND RULE 28.1 STATEMENT

1. *Plaintiffs*

Cross-Petitioners Joseph A. Bonjorno, Lorraine Kerr (Executrix of the Will of George M. Kerr, Jr.) and Barbara K. Clisby ("Plaintiffs"), are the former shareholders and trustees in liquidation of the original Plaintiff below: Columbia Metal Culvert Company of Vineland, New Jersey. Pursuant to Supreme Court Rule 28.1, Plaintiffs state that they have no other corporate affiliations.

2. *Kaiser*

Cross-Respondents and original Petitioners are Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc. (collectively "Kaiser"), who were defendants in the antitrust action below.

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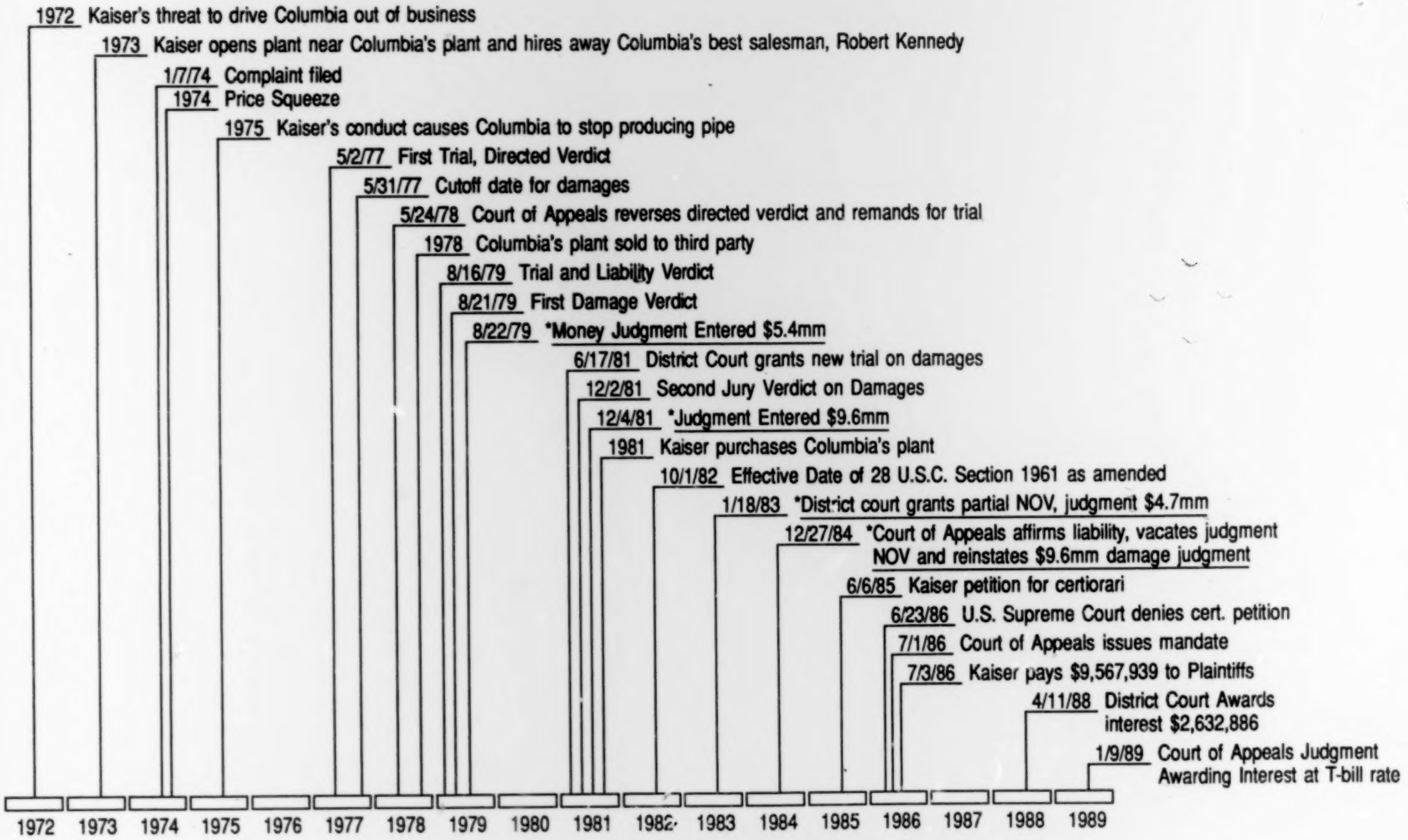
BONJORNO TIME LINE


1972 Kaiser's threat to drive Columbia out of business
1973 Kaiser opens plant near Columbia's plant and hires away Columbia's best salesman, Robert Kennedy
1/7/74 Complaint filed
1974 Price Squeeze
1975 Kaiser's conduct causes Columbia to stop producing pipe
5/2/77 First Trial, Directed Verdict
5/31/77 Cutoff date for damages
5/24/78 Court of Appeals reverses directed verdict and remands for trial
1978 Columbia's plant sold to third party
8/16/79 Trial and Liability Verdict
8/21/79 First Damage Verdict
8/22/79 *Money Judgment Entered $5.4mm
6/17/81 District Court grants new trial on damages
12/2/81 Second Jury Verdict on Damages
12/4/81 *Judgment Entered $9.6mm
1981 Kaiser purchases Columbia's plant
10/1/82 Effective Date of 28 U.S.C. Section 1961 as amended
1/18/83 *District court grants partial NOV, judgment $4.7mm
12/27/84 *Court of Appeals affirms liability, vacates judgment NOV and reinstates $9.6mm damage judgment
6/6/85 Kaiser petition for certiorari
6/23/86 U.S. Supreme Court denies cert. petition
7/1/86 Court of Appeals issues mandate
7/3/86 Kaiser pays $9,567,939 to Plaintiffs
4/11/88 District Court Awards interest $2,632,886
1/9/89 Court of Appeals Judgment Awarding Interest at T-bill rate
1972 1973 1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989

*denotes the various "judgments" entered in this case

OPINIONS BELOW

The instant claim for interest arises out of a complex and protracted treble damage antitrust action. The Complaint was filed in January 1974.[1] The Judgment and Opinion of the Court of Appeals dated January 9, 1989, awarding interest, are reproduced at Kaiser's Pet. A-1 and Pet. A-3, respectively. The Opinion, as amended, is reported at 865 F.2d 566 (3d Cir. 1989). The Opinion of the District Court on interest dated April 11, 1988, is reproduced at Pet. A-31.

This Court denied certiorari twice on the substantive issues underlying the interest issues in this case.[2] The opinions on the merits of the antitrust claim are relevant only to the extent they form the factual basis for the interest rulings at issue.[3]

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[1] Attached in the Appendix to the Cross-Petition, and reproduced for the convenience of the Court on the opposite page, is a document entitled "Bonjorno Time Line" which succinctly identifies the principal opinions and events in the extraordinary and prolonged history of this case.

[2] *Kaiser Aluminum & Chemical Corp. v. Columbia Metal Culvert Co.*, 439 U.S. 876 (1978); *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 477 U.S. 908 (1986).

[3] The Opinion of the Court of Appeals on the merits of the antitrust claim, dated December 27, 1984, is reproduced at J.A. 185, and is reported at 752 F.2d 802 (3d Cir. 1984), *cert. denied*, 477 U.S. 908 (1986).

The Opinions of the District Court on the merits of the antitrust claim are reported at 518 F. Supp. 102 (E.D. Pa. 1981) and 559 F. Supp. 922 (E.D. Pa. 1983) and are reproduced at J.A. 92 and J.A. 147, respectively.

The Opinion of the Court of Appeals in an earlier appeal decided on May 24, 1978, is reported at 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978).

A pretrial appeal on a collateral issue, where Plaintiffs prevailed, is reported at 526 F.2d 724 (3d Cir. 1975).

JURISDICTION

The judgment of the Court of Appeals on interest was entered on January 9, 1989. Cross-Petitions for rehearing and rehearing *in banc* were denied by Order dated February 13, 1989. Pet. A-29. Kaiser filed a Petition for a Writ of Certiorari on March 30, 1989. No. 88-1595. Kaiser invoked the jurisdiction of this Court under 28 U.S.C. §1254(1).

Plaintiffs received Kaiser's petition in No. 88-1595 on March 30, 1989 and filed a Cross-Petition invoking the jurisdiction of this Court under 28 U.S.C. §1254(1) and Supreme Court Rule 19.5, on April 28, 1989. The Cross-Petition was timely filed both under Rule 19.5 within 30 days of receipt of Kaiser's Petition and under 28 U.S.C. §2101(c) and Rule 20.4 within 90 days of the denial of rehearing by the Court of Appeals.

RULES OF COURT AND STATUTES INVOLVED

This case involves Fed. R. App. P. 37 and 28 U.S.C. §1961, which are set forth in their entirety in the Appendix to this Brief.

STATEMENT OF THE CASE

Kaiser – by delay caused by its post-trial motions – has retained over ten years' interest (from August 1979), on Plaintiffs' multimillion dollar judgment. In the commercial marketplace, Kaiser would have had to pay $18.6 million for this use of Plaintiffs' money. Plaintiffs seek interest commensurate with this economic reality to compensate them for the loss of the time value of money sustained due to Kaiser's post-trial motions and to afford them the full and ample relief which they were awarded, and to which they are entitled, under the antitrust laws.

A. Kaiser Used Predatory Tactics And Abused Its Monopoly Power To Destroy Plaintiffs' Business

Kaiser, a large international integrated manufacturer of aluminum products, was found liable in August 1979 for deliberately destroying Plaintiffs' relatively small competing

business, Columbia Metal Culvert Co., Inc. ("Columbia"), to strengthen and maintain its monopoly. J.A. 185-206. *See* Bonjorno Time Line, Cross-Pet. A-1.

By May 1977, when this case first went to trial,[4] Kaiser had effectively driven Columbia out of business.[5] J.A. 105-106. The first trial in 1977 resulted in a directed verdict in favor of Kaiser, which was reversed by the Court of Appeals, holding that Plaintiffs presented proper evidence showing intentional, predatory conduct in violation of the antitrust laws. *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 31 (3d Cir. 1978) (Adams, J., for a unanimous panel).

This Court denied Kaiser's petition for certiorari. *Kaiser Aluminum & Chemical Corp. v. Columbia Metal Culvert Co., Inc.*, 439 U.S. 876 (1978).

But for this error by the District Court incorrectly granting a directed verdict, Plaintiffs would have obtained a judgment in their favor in May 1977 and interest would run from that date.

In August 1979, in a retrial on remand, the jury found that Kaiser monopolized the market for fabricated aluminum culvert pipe, and intentionally destroyed Plaintiffs' business by its predatory and anticompetitive conduct. J.A. 87-89. On August 22, 1979, a judgment was entered in favor of Plaintiffs and against Kaiser in the trebled amount of $5,445,000. J.A. 91.

The August 1979 liability finding, modified to incorporate the higher amount of damages awarded in a subsequent retrial limited only to damages (which only Kaiser had requested), was affirmed by the Court of Appeals on December 27, 1984. J.A. 206. Former Chief Circuit Judge Seitz in a

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[4] There was some delay in completion of pre-trial discovery because the District Court erroneously dismissed one of the Defendants, and Plaintiffs were forced to pursue an appeal to obtain a reversal of that ruling. *Columbia Metal Culvert Co. v. Kaiser Industries Corp.*, 526 F.2d 724 (3d Cir. 1975).

[5] In January 1974, Columbia had filed its complaint to seek redress under the antitrust laws. J.A. 1. The complaint was based on conduct by Kaiser and injuries to Plaintiffs dating back to at least 1971. J.A. 95. By 1975, Kaiser's predatory conduct had forced Plaintiffs to stop producing new aluminum culvert pipe. J.A. 91; *cf.* J.A. 132.

unanimous panel opinion, specifically found sufficient evidence that justified the jury to conclude "that Kaiser * * * exercised [its] power to destroy its competition." J.A. 197.[6] As the Court of Appeals noted: "The Plaintiffs' basic injury was that Columbia was driven out of business." J.A. 201.

In affirming the August 22, 1979 liability judgment, the Court's opinion summarized the issue succinctly and sharply:

> When a monopolist competes by denying a source of supply to his competitors, raises his competitor's price for raw materials without affecting his own costs, lowers his price for the finished goods, and threatens his competitors with sustained competition if they do not accede to his anticompetitive designs, then his actions have crossed the shadowy barrier of the Sherman Act.

J.A. 197.

As of August 22, 1979, Plaintiffs had established Kaiser's liability for intentionally destroying their business over the period from 1971 to 1977 in violation of the antitrust laws, and had obtained a multimillion dollar judgment in their favor against Kaiser. Kaiser's liability was repeatedly affirmed in response to all of Kaiser's post-trial motions and appeals, and although the amount of damages was subsequently recalculated at Kaiser's request, the second jury emphatically reaffirmed the damages by awarding an even higher amount than the first jury had awarded for Kaiser's

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[6] Judge Seitz summarized a portion of the testimony regarding Kaiser's predatory conduct as follows:

> There was testimony that Holmes Collins [in 1972] the Kaiser manager of the division that manufactured and marketed the aluminum pipe, threatened to open a pipe fabrication plant "across the street" from Columbia if it purchased its raw materials from other sources. There were threats that if Kaiser saw so much as one pound of metal from another producer that it would terminate its relationship with Columbia. When Columbia did purchase aluminum from another company, Kaiser carried through with its threats by locating a pipe plant only 40 miles from Columbia's and by refusing to sell any more coil to Columbia.

J.A. 191-192.

destruction of Plaintiffs' business over the period from 1971 to 1977.[7]

At no time, between 1979 when its liability was established and 1986, did Kaiser tender any sum to Plaintiffs as specifically permitted under Fed. R. Civ. P. 67, to stop or reduce the running of interest. Kaiser, to this day, refuses to tender one penny of interest.

B. Kaiser, Notwithstanding Its Liability For Wrongful Conduct, Has Received Benefits Of More Than $18.6 Million From The Use Of Plaintiffs' Money Due To Delays Occasioned By Its Post-Trial Motions

1. Kaiser's Post-Trial Motions

Kaiser filed post-trial motions, after both the first[8] and the second jury verdicts, which were ultimately unsuccessful.[9]

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[7] *The Award Was Valued As Of 1977*: The December 1981 treble-damage award of $9,567,939, was based upon calculations of damages measured only up to May 31, 1977. J.A. 170 & 170 n.4.

The Interrogatories answered by the first jury on August 21, 1979 specifically found damages valued as of May 31, 1977, or earlier. J.A. 90. In accordance with the District Court's endorsement of Plaintiffs' theory of damages and in conformance with the evidence offered on liability at the 1979 trial, Plaintiffs presented evidence at the 1981 trial on damages *valued as of no later than May 31, 1977*. J.A. 129.

The court deleted the references to May 1977 from the Interrogatories answered by the jury on December 2, 1981, to accommodate Kaiser's contentions that damages should be valued as of 1975 instead of 1977. J.A. 132-133. See also J.A. 136, 145, 170 n.4.

[8] *Kaiser's 1979 Post-Trial Motions*: After the August 22, 1979 judgment, Kaiser filed post-trial motions. The District Court delayed for almost two years until June 17, 1981, when it denied Kaiser's Motion for JNOV and affirmed the liability finding, but granted Kaiser's alternative request for a new trial limited to damages only. J.A. 92, 127. Plaintiffs' motion for reconsideration of this order was denied. J.A. 45. The order could not have been appealed. *See Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980) (per curiam).

[9] *The 1981 Jury Verdict On Retrial Of Damages*: On December 2, 1981, the jury rendered its damage verdict in the retrial on damages,

(Continued on following page)

They did, however, effectively delay for seven years payment of any money whatsoever on its liability established in 1979 for damages to Plaintiffs over the period from 1971 to 1977.

2. Plaintiffs' Petition In 1986 For Interest

On June 24, 1986, prio to issuance of the Court of Appeals' mandate on its December 27, 1984 judgment, Plaintiffs, pursuant to Fed. R. App. P. 37, petitioned for instructions in the Court of Appeals' mandate to cover interest on the recalculated da ge award as reinstated by the court. J.A. 75. Following a stipulation that the District Court should consider the interest issue in the first instance, the Court of Appeals issued its mandate on July 1, 1986 (J.A. 75, 210), and on July 3, 1986, Kaiser paid Plaintiffs $9,567,939.

The District Court did not issue its ruling on interest for some 21 months, until April 11, 1988 (J.A. 58-59 (docket entries)), awarding only $2,632,886 at 6% simple interest, under Pennsylvania law following the old version of 28 U.S.C. §1961, that had been repealed in 1982 when the Congress authorized T-bill rate interest on routine federal District Court judgments. Pet. A-31 (Opinion). The Cross-

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based on the liability finding of August 1979. J.A. 145. On December 4, 1981 the District Court entered judgment in the trebled amount of $9,567,939. J.A. 146.

Kaiser's Second Post-Trial Motions in 1981, And Reinstatement By The Third Circuit Of The Jury's Award: Following the 1981 retrial on damages, Kaiser again filed extensive post-trial motions. J.A. 47-50, 150-151. After delaying more than another year, the District Court granted, in part, Kaiser's Motion for JNOV, reduced the amount of the judgment, and entered a final appealable judgment on January 18, 1983. J.A. 184.

On cross-appeals, after almost two more full years, on December 27, 1984, the Third Circuit affirmed the liability finding from the August 16, 1979 verdict and the August 22, 1979 judgment and reinstated the full judgment in the amount of $9,567,939. J.A. 185.

On June 23, 1986, this Court denied Kaiser's petition for certiorari. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 477 U.S. 908 (1986).

Appeals of that order resulted in the Court of Appeals' judgment of January 9, 1989 which is the subject of this Court's writ of certiorari (*see* ¶ C below pp. 9-10).

3. Abnormally High Market Interest Rates Result In Kaiser's Unjust Enrichment At Plaintiffs' Expense

The time over which Kaiser delayed its ultimate day of reckoning was a time of abnormally high inflation and high interest rates, with the prime rate peaking over 20%. Reitz, *Interest on Judgments in Federal Litigation* (1986), at J.A. 212;[10] *see also* J.A. 303-308. Measured at a conservative market calculation for commercial borrowers[11] (monthly average prime rates, compounded monthly), interest on $9,567,939 from August 1979 through the date of the briefs filed with the Court of Appeals (June 13, 1988), and accounting for Kaiser's payment of $9,567,939 on July 3, 1986, would yield interest due in excess of $17 million, with interest continuing to accrue at $4,250 per day. J.A. 303.[12]

4. Interest Under 28 U.S.C. §1961, As Amended, Is Significantly Less Than Commercial Free Market Rates

Because treasury bills represent short-term borrowings of the most creditworthy debtor – the federal government –, the

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[10] Reproduced in the Joint Appendix, beginning at J.A. 212, is a scholarly analysis of application of 28 U.S.C. §1961 in federal litigation prepared by Curtis R. Reitz, Algernon Sydney Biddle Professor of Law University of Pennsylvania, at Plaintiffs' request in October 1986, which Plaintiffs submitted to the District Court. References to Professor Reitz' analysis are set forth as "Reitz, J.A. ___."

[11] Because of delay in collection of the judgment, Plaintiffs' own debts remaining from the business Kaiser destroyed continued to accrue interest at 2.5% *above* Philadelphia National Bank's daily prime rate or 3% *above* average monthly commercial paper rate, *whichever rate was higher, compounded monthly.* J.A. 290-291.

[12] As of today, that $17 million has increased to over $18.6 million.

rates of interest they bear are typically 2 to 3 percentage points below the prime rates of interest that represent the cost of money to the most creditworthy private businesses.[13] In addition, compounding only once a year as provided in 28 U.S.C §1961(b) undervalues the actual cost of money, because interest in the free market is typically compounded at least monthly in business loans. See Reitz, J.A. 231; *see also* note 11 above & pp. 43-44 below.

The rule of convenience established for interest on run-of-the-mill federal District Court judgments in 28 U.S.C. §1961 provides for a single fixed treasury bill rate to apply over the entire period over which interest runs, irrespective of how the true rate fluctuates, up or down. By contrast, the cost of money in the commercial lending marketplace is typically measured by floating interest rates set at a particular number of percentage points above prime. *See, e.g.*, note 11 above & p. 44 & nn.71-72 below.

The difference between interest at a fixed sub-market rate and interest at fluctuating commercial market rates is likely to become significantly pronounced in cases in which stays of execution and post-trial and appellate proceedings delay execution for many years during periods of particularly high and volatile inflation and interest rates. Thus, computing interest from August 1979, (up to the date of Plaintiffs' opening Brief before the Court of Appeals June 13, 1988), the shortfall between commercial market rate interest (monthly average prime, compounded monthly: $17,080,036) and interest at the federal T-bill rate (fixed 10.05%, compounded annually: $10,823,335) amounted to $6,256,701. *See* J.A. 303-304. That results in a shortfall of approximately 36% of the market measure.[14]

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[13] *See* Reitz, J.A. 231; *see also* pp. 42-43 & nn.69-70 below pointing out how the Congress, when it amended 28 U.S.C. §1961 in 1982, backed away, at the request of Budget Director Stockman, from the original draft providing interest at *prime rate*.

[14] As of August 3, 1989, the date of this Brief, the market rate interest has mounted to $18,637,022, while the T-bill interest has grown to only $11,963,588, leaving a shortfall of $6,673,434 – or 35.8%

C. The Judgment Of The Court Of Appeals

In determining the appropriate interest on its December 27, 1984 judgment, the Court of Appeals:

(1) denied as "without merit,"[15] Plaintiffs' request that interest be calculated at monthly average prime rates, compounded monthly, from August 1979, which would have returned to Plaintiffs the full value of their judgment in an award of interest as of June 1988 in excess of $17 million;

(2) denied Plaintiffs' request for 2-1/2 years of interest from August 1979, and instead held that interest should begin to run only as of December 2, 1981, the date of the damage verdict on the retrial on damages;

(3) rejected Kaiser's contention that interest should only run from the date of issuance of the Court of Appeals mandate on July 1, 1986 following denial by this Court on June 23, 1986 of Kaiser's petition for certiorari; and

(4) held that, on the facts and equities of this case, application of current law, which has now been in effect over six years, does not result in "manifest injustice"; – and therefore the amount of interest is determined by the current version of 28 U.S.C. §1961, rather than the

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[15] The Court of Appeals rejected Plaintiffs' position in one sentence with no discussion:

> We have considered Bonjorno's argument that a "market rate" of interest should apply; however, we find the argument to be without merit.

865 F.2d at 572, n.10, Pet. A-14 n.11. From the Court of Appeals' discussion of 28 U.S.C. §1961, rejection of Plaintiffs' argument must have been based on the Court of Appeals' perception that it lacked the power to make such an award, and felt bound by the provisions of the federal interest statute, 28 U.S.C. §1961, which by its terms only applies to District Court judgments.

version repealed by Congress over seven years ago.

The Court of Appeals, by the foregoing holdings, denied Plaintiffs interest over the period between the first judgment in their favor and the second judgment. This took away from the injured Plaintiffs, and granted to the predatory monopolist, a free ride on 2-1/2 years of interest on a multimillion dollar judgment.

The court below also denied Plaintiffs' request for interest at free market rates that would accurately measure the time value of money, apparently believing – and we submit, wrongly – that it was constrained by the rate set forth in 28 U.S.C. §1961 for calculation of interest by the clerk's office in execution on federal District Court judgments in run-of-the-mill cases.

D. This Court's Granting Of Certiorari On Cross-Petitions

Kaiser filed a petition for a writ of certiorari contending that the Court of Appeals erred in allowing interest at the federal T-bill rate provided in 28 U.S.C. §1961 as amended, rather than the 6% simple interest rate under a Pennsylvania statute Kaiser proposed pursuant to the version of §1961 repealed by Congress in 1982. No. 88-1595. Kaiser also contended that the Court of Appeals erred in allowing interest to run from December 2, 1981.

Plaintiffs filed this cross-petition (No. 88-1771), respectfully contending that the Court of Appeals:

(1) erred in denying Plaintiffs 2-1/2 years of interest from their original judgment in August 1979 to December 2, 1981;

(2) failed to recognize and act upon its power (inherent, equitable and under Fed. R. App. P. 37) to award adequate interest to preserve the value of the judgment over long periods of post-trial and appellate delays; and

(3) erred in denying market rate interest and limiting Plaintiffs to inadequate interest which would grant Kaiser unjust enrichment from delay at Plaintiffs' expense.

On June 19, 1989, this Court granted both petitions. J.A. 311.[16]

SUMMARY OF ARGUMENT

1. *The Facts*, underlying this dispute for full market interest (as to *time period*, *rate* and *principal amount* where there is a recalculation of the damage award), are sharply etched (*See* Bonjorno Time Line, opposite p.1) and not in dispute:

Beginning some 18 years ago, Kaiser, a large fully integrated manufacturer of aluminum products, abused its monopoly power through a series of intentional and viciously unfair predatory acts, and undertook to and did destroy the Plaintiffs' small competing business as a fabricator of aluminum highway drainage pipe.

If Kaiser prevails on its contention that it owes only two days of interest, it will – by exhausting its judicial remedies – have achieved 10 profitable years of delay, during which it has enjoyed the use of Plaintiffs' money, and has profited at Plaintiffs' expense in an amount in excess of $18,637,022, which represents 66% of the total sum due[17] as found by the jury.

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[16] The two writs are being briefed on a simultaneous schedule. This Brief on the Merits of Plaintiffs' Cross-Petition is addressed solely to the Plaintiffs' issues in the cross-petition in No. 88-1771. Plaintiffs, as Respondents, will respond to the issues raised in Kaiser's petition in No. 88-1595 in a separate brief.

[17] Interest ($18,637,022) plus the judgment amount ($9,567,939) totals $28,204,961. The interest represents 66% of that total amount.

As of 1979, Kaiser owed Plaintiffs treble damages for destruction of their business over the period from 1971 to 1977. Yet Kaiser did not pay Plaintiffs one penny until 1986 and still refuses to pay any interest whatsoever.

In addition to enjoying the use of Plaintiffs' money over this period, Kaiser has also enjoyed the benefits of its monopoly.

While Kaiser enjoyed the use of Plaintiffs' money, Plaintiffs continued to rack up interest *at 2.5 points above prime* on the debts, which along with the cause of action against Kaiser, were all that remained of Plaintiffs' once thriving business. *See* p. 7 n.11 above.

The facts, as found by the jury, have been confirmed by two different panels in two separate appeals to the Court of Appeals below. This Court, over three years ago, refused to grant certiorari. Meanwhile, Kaiser has paid only a sum equal to the principal amount of the judgment, which it did not pay until 1986. Kaiser continues to fight this case to the bitter end, refusing to tender even one penny of interest, as is specifically provided for in Fed. R. Civ. P. 67 as a means of stopping or diminishing the running of interest.

2. *Underlying Policy Considerations*: If Kaiser succeeds in turning losses into wins through delays in the courts, thereby profiting from the use of Plaintiffs' money, it will send a loud and clear message to other litigants that they too can similarly profit and, in antitrust cases, frustrate national policy, by exhausting their judicial remedies, and in the process exhaust their opponents and the courts as well.

3. *Error By The Court Below*: As will be demonstrated in this Brief (and Plaintiffs' upcoming Brief in reply as Respondents in No. 88-1595) while the Court below properly reversed the trial judge's award of interest (an entirely inadequate $2.6 million under a repealed federal law that looked to the law of the State – *i.e.*, Pennsylvania: simple interest at 6%) it nevertheless erred in two major respects:

First, as to *time period*, it denied Plaintiffs some 2-1/2 years of interest from the date liability was fixed and the original judgment was entered in favor of Plaintiffs (August 1979) until the second trial on damages (December 1981). Kaiser alone sought the retrial on damages and the second jury emphatically reaffirmed the findings of the first, almost doubling the original award. The damages awarded were based solely on the 1979 findings and were still measured only up to 1977, with *no* provision for *any interest* during the interim period.

Second, as to *rate*, it directed that interest should be calculated under a federal statute (intended to apply only to routine writs of execution on judgments of the District Court: 28 U.S.C. §1961 as amended). This statute provides for a fixed interest rate, arbitrarily set based on a single treasury bill auction (some 2 to 3 points below prime), and compounded only once a year.

4. *The Remedy And Relief Sought*: Plaintiffs respectfully ask this Court to now reaffirm and make clear for all Courts of Appeals, that in cases such as this, where there have been extended delays because of the judicial process, they have the power (inherent, equitable and under Fed. R. App. P. 37) to award sufficient interest to carry out the fourfold purposes of interest:

(1) *Preserve judgments* against diminution due to loss of the time value of money;

(2) *Prevent unjust enrichment* by the Defendant who has had the use of Plaintiffs' money;

(3) *Vindicate national antitrust enforcement policy* by ensuring that the *wronged* receive full compensation, without diminution over time, and that the *wrongdoer* pays the full measure of the award against it; and

(4) *Remove any financial incentive* by payment of interest *less than* market rate that encourages litigants to delay payment by exhausting all post-trial and appellate remedies that the judicial process allows.

Thus, Plaintiffs ask that the Court remand with instructions that interest should be awarded from August 22, 1979, when liability was fixed, until payment by Kaiser of all sums due at monthly average prime rates compounded monthly.

ARGUMENT

I. THE HISTORY AND PURPOSES OF COURT AWARDED INTEREST ARE NOT IN DISPUTE

The history of interest is as old as the history of commerce. *See generally* S. Homer, *A History of Interest Rates* (2d ed. 1977).[18] Nevertheless, medieval concepts of usury – a medieval Christian tenet that charging any interest whatsoever for loans was immoral – has tempered and distorted

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[18] Indeed, one of the first codifications of statutory law, the Code of Hammurabi adopted in 1800 B.C. in Babylonia, adopted as legal maxima the millenial customary interest rates of 33 1/3% per annum for grain loans repayable in kind and 20% per annum for silver loans. *Id.* at 29-30.

common law awards of interest by the courts. *See generally National Bank of Commonwealth v. Mechanics' National Bank*, 94 U.S. 437, 438 (1876); *Marshall v. Beeler*, 104 Kan. 32, 178 P. 245 (1919); S. Homer, *A History of Interest Rates*, at 69-72.

This Court, however, has consistently recognized the legitimacy and equity of interest awards and the inherent and equitable power of the courts to award adequate interest to account for the time value of money. *See, e.g., Young v. Godbe*, 15 Wall. (82 U.S.) 562, 565 (1872); *National Bank of Commonwealth v. Mechanics' National Bank*, 94 U.S. 437 (1876); *Billings v. United States*, 232 U.S. 261, 286 (1914); *Miller v. Robertson*, 266 U.S. 243, 256-259 (1924); *Jacobs v. United States*, 290 U.S. 13, 16 (1933); *West Virginia v. United States*, 479 U.S. 305 (1987); *Texas v. New Mexico*, 482 U.S. 124, 132 n.8 (1987).

Thus, more than a century ago the federal courts, by the decisions of this Court, swept aside the undue reluctance to award interest, as expressed in English common law which had been transplanted into the common law of the states. *See generally National Bank*, 94 U.S. at 438. As this Court later stated in *Billings v. United States*, 232 U.S. 261, 287-88 (1914):

> The conflict between the systems is pronounced and fundamental. In the one, the state rule, except as to contract, no interest without statute; in the United States rule, *interest in all cases where equitably due unless forbidden by statute*. (emphasis added).

The Court in *Billings*, explaining its past clear break with the harsh and antiquated common law rule, went on to stress that interest was merely compensation for the use of money and should generally be awarded by federal courts *even in the absence of statutory authority:*

> It would serve no purpose to refer to the abhorrence which obtained in early times concerning the payment of interest and the evolution by which the legitimate character of interest was gradually understood and it came to be recognized that its payment was, as a general principle, but the *compensation due for the use of money* or that its allowance was merely for damages caused by delay in discharging a duty and therefore in default on a contract to pay money even without express legislation so directing, interest would be allowed. * * * Thus, as to the necessity for a statute it was long ago here decided in view of the true conception of interest, *that a statute was not necessary* to compel its payment where in *accordance with the principles of equity and justice* in the enforcement of an obligation, interest should be allowed. (emphasis added).

232 U.S. at 285-86 (citing *Young v. Godbe*, 15 Wall. (82 U.S.) 562, 565 (1872)).

In recent years, as the Federal Reserve Bank has begun to focus on driving up interest rates to regulate the money supply and the economy, traditional 6% legal interest rates have become entirely inadequate to serve their intended purpose to *overestimate* the market value of money to encourage prompt payment of sums due. *See Union Pacific R.R. Co. v. United States*, 11 Ct. Cl. 177 (1986). In this setting, equitable awards of market rate interest by the courts have become all the more important.

The fourfold purposes of interest on court judgments are not in dispute:

(1) *Preserve The Value, and (2) Prevent Unjust Enrichment:* Courts routinely award interest to account for the time value of money, stressing the now time-honored principle that the purpose of such awards is to disgorge the benefits received by the wrongdoer by withholding money rightfully belonging to the victim, and to ensure that neither side enjoys a benefit or suffers a loss due to the delays inherent in the judicial process.[19]

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[19] *See Bruning v. United States*, 376 U.S. 358, 360 (1964) ("interest is considered to be the cost of the use of the amounts owing a creditor and an incentive to prompt repayment and, thus, an integral part of a continuing debt"); *Billings*, 232 U.S. at 285 (payment of interest is "compensation due for the use of money [and] its allowance [is] merely for damages as caused by delay in discharging a duty"); Note, *Interest On Judgments In The Federal Courts*, 64 Yale L.J. 1019, 1048 (1955) ("Granting the existence of these delays, the real issue is who should bear the cost resulting from the loss of use of money. One party must, and since defendant is the adjudged wrongdoer, this expense properly falls to him.").

(3) *Vindicate National Anti-Monopoly Free And Fair Competition Policy*: Full market rate interest is also required to preserve the full damage award, as trebled,[20] against diminution to implement a national anti-monopoly policy of the Congress (which dates back to 1890), to deter violations, through the private attorney general concept, which encourages treble damage enforcement actions in the Courts.[21] See pp. 19-20 & nn.27-28, & p. 37 n.58 below.

(4) *Eliminate Incentive For Delay*: Finally, as a matter of judicial administration to ensure a prompt and efficient justice system, court awarded interest serves to eliminate incentives for delay.[22] Unless interest awards in cases such as

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[20] Treble damages under 15 U.S.C. §15 are considered to be partially justifiable on compensatory grounds because an antitrust violation often involves numerous intangible economic harms. *See Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 635 (1985) ("the treble-damages cause of action * * * seeks primarily to enable an injured competitor to gain compensation for that injury."); *American Society of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 572 n.10, 575 (1982); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-486 & n.10 (1977) ("the treble-damage provision, which makes awards available to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy"); *see also Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 667 & n.36 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975).

[21] *See Mitsubishi Motors*, 473 U.S. at 634-35; *Brunswick Corp.*, 429 U.S. at 485 ("treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing"); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972); *see also Fishman v. Estate of Wirtz*, 807 F.2d 520, 584 (7th Cir. 1986) (Easterbrook, J., dissenting) ("Any erosion of the trebling on account of a denial of interest undermines the deterrent force of the antitrust law.").

[22] *Cf.* Fed. R. App. P. 38; *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1, 3-4 (1987) (discussing state statutes providing for mandatory penalty for unsuccessful appeal).

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this one fully account for the time value of money, the courts unwittingly encourage incentives for delay, particularly in complex litigation involving large sums of money and requiring extensive use of limited judicial resources.

To implement these four purposes of interest awards, the courts must exercise their power to impose economic reality and award interest at the litigants' cost of money, particularly where the Plaintiffs are prevented from collecting the judgment during stays and post-trial and appellate delays initiated by the defendants.

II. NOTHING SHORT OF FULL MARKET RATE INTEREST FOR THE FULL TIME PERIOD (FROM THE ORIGINAL JUDGMENT OF LIABILITY TO PAYMENT OF ALL PRINCIPAL AND INTEREST) WILL VINDICATE THE POLICY BEHIND INTEREST AWARDS IN THIS CASE

A. *THE TIME PERIOD*: Interest Should Run From The Date Of The Original Judgment In Favor Of Plaintiffs

1. Plaintiffs, Whose Damages Were Measured As Of May 31, 1977, Are Entitled To Interest On The Judgment From August 22, 1979

Kaiser's liability was first and finally determined in August 1979 and was repeatedly affirmed by the courts in all of Kaiser's subsequent challenges. Thus, as of August 1979, Plaintiffs had established in a court of law that Kaiser was

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See also p. 43 n.70 quoting from the Senate Report on the bill to amend 28 U.S.C. §1961 discussing removal of the "economic incentive" for delay because state interest rates under old 28 U.S.C. §1961 were frequently unrealistically low. Pennsylvania's 6% statute represents the lowest non-variable rate in the nation. *See* Note, *The Postjudgment Interest Rate in Pennsylvania: Ignoring Reality For Too Long*, 23 Duq. L. Rev. 1083, 1083-84 (1985).

liable to them for treble damages for the destruction of their business over the period from 1971 to 1977.

Ignoring the original multimillion dollar judgment in favor of Plaintiffs on August 22, 1979, the court below erred in denying Plaintiffs 2-1/2 years of interest from August 1979 to December 1981.[23]

The court below failed to follow the basic, well-established rule, consistent with the purposes of interest awards and precedent in this Court, that interest on the judgment runs from the date of the original judgment in plaintiffs' favor, unless (which are not the facts here, see below p. 5 n.7) subsequent recalculation of damages accounts for the time value of money after the date of the original award.[24]

2. This Court's Precedent Dictates That Interest On The Judgment Runs From The Date Of The Original Judgment

This Court has recognized that interest on the judgment should be awarded from the date of the original judgment over periods of court delay even if the amount of the judgment is subsequently altered.[25] *De La Rama v. De La Rama*, 241 U.S. 154, 159-160 (1916); *Kneeland v. American Loan & Trust Co.*, 138 U.S. 509 (1891); *see also Ex parte Republic of*

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[23] To the extent Kaiser has contended, or may contend, that "error of the court" is determinative of the date interest begins to run, then interest should be awarded as of May 1977, for this is when the District Court wrongly granted a directed verdict in favor of Kaiser.

But for the court's error, judgment would have been entered in Plaintiffs' favor some 2 years earlier in May 1977. Moreover, the jury's award does not account for the time value of money after that date.

[24] *See Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1299-1300 (9th Cir. 1984) (unanimous panel opinion joined by then Circuit Judge, Mr. Justice Kennedy), *cert. denied*, 469 U.S. 1190 (1985).

[25] See also Section B, pp. 29-30, where we point out that where there has been a recalculation upwards, interest should run on the increased principal amount from the date liability first attached.

Columbia, 195 U.S. 604 (1904); *The Conemaugh*, 189 U.S. 363 (1903). The date the amount of the judgment is definitively determined is not the proper date to begin interest where the damages are valued as of an earlier date.

Some courts' reluctance to allow interest for the period before the final amount due has been definitively determined, stems from an historical anomaly making an unjustified distinction between *liquidated* and *un*liquidated damages. This Court has recognized that distinction as "not a sound one."[26]

While there may be arguments for and against awarding *pre*judgment interest back to the date of the original wrong[27] (i.e., before it has been judicially determined that a wrong occurred) there is certainly no justification for denying interest *after* the date the jury finds (which finding is never

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[26] As this Court stated in *Funkhouser v. J.B. Preston Co.*, 290 U.S. 163, 168-169 (1933):

> *It has been recognized that a distinction, * * * simply as between cases of liquidated and unliquidated damages, is not a sound one.* [footnote omitted]. Whether the case is of the one class or of the other, the injured party has suffered a loss which may be regarded as not fully compensated if he is confined to the amount found to be recoverable as of the time of the breach and nothing is added for the delay in obtaining the award of damages. *Because of this fact, the rule with respect to unliquidated claims has been in evolution * * ** and in the absence of legislation the courts have dealt with the question of allowing interest according to their conception of the demands of justice and practicality. (emphasis added).

[27] Indeed, courts in Pennsylvania, where the federal District Court below is located, routinely allow delay damages in *tort* actions for the period from the filing of the complaint or one year after the first injury. Pa. R. Civ. P. 238. *See generally Ceresini v. Valley View Trailer Park, Ephrata, Inc.*, 380 Pa. Super. 416, 552 A.2d 258 (1988) (en banc) (revised Rule 238 applies to pending cases).

Section 4 of the Clayton Act was amended in 1980 to provide for prejudgment interest in certain circumstances for cases filed after 1980. *See* 15 U.S.C. §15(a); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 582-584 (7th Cir. 1986) (Easterbrook, J., dissenting). As Judge Easterbrook persuasively argues, prejudgment interest should be allowed in antitrust cases, and Plaintiffs should be allowed interest on certain sums from 1971.

thereafter set aside) that the wrongdoer unlawfully caused damage in some amount.[28] At that point the Defendant knows it has a damage exposure (albeit in an undetermined amount) that it cannot avoid. Mindful of this very situation, and the ever more prevalent practice of bifurcated trials between liability and damages, the Federal Rules of Civil Procedure wisely give the Defendant the option of stopping or cutting back on the running of interest by tendering what it feels may be its ultimate damage responsibility.[29]

Interest Should Begin To Run When Liability Is Established

Principles of justice and equity, as well as the policy behind court awarded interest, dictate that interest on the judgment should be awarded from the date that liability is established and the jury or the Court determine that the Defendant is liable. *See, e.g., De La Rama*, 241 U.S. at 159.[30] Precedent from the circuits over-

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[28] Plaintiffs have not sought *pre*judgment interest for the period from May 31, 1977 to August 22, 1979, but rather are seeking *post*judgment interest for the period after the original judgment in their favor which is allowed as a matter of course in antitrust cases, as in all cases. *See, e.g., Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1298-1300 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985); *Litton Sys. Inc. v. AT&T*, 746 F.2d 168 (2d Cir. 1984); *see also United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875 (1st Cir. 1971) (postjudgment interest on treble damages); *cf. Rodgers v. United States*, 332 U.S. 371, 373 n.2 (1947) (regardless of relative equities on prejudgment interest on non-remedial civil penalties, postjudgment interest is provided by statute).

[29] *See* Fed. R. Civ. P. 67, *see also* Note, *Interest On Judgments In The Federal Courts*, 64 Yale L.J. 1019, 1028-29 (1955); *Devex Corp. v. General Motors Corp.*, 749 F.2d 1020, 1022-1023 (3d Cir. 1984), *cert. denied*, 474 U.S. 819 (1985). During the two years while the District Court deliberated on Kaiser's post-trial motions from 1979 to 1981, Kaiser could have tendered the judgment amount to stop interest. Instead, it retained the money, which rightfully belonged to Plaintiffs, and benefited from its use. *Cf. Handgards*, 743 F.2d at 1300 n.28.

[30] In *De La Rama*, the appellant husband challenged the award of interest on the judgment from the date of a divorce decree. In affirming

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whelmingly supports this view.[31] *See Chattem, Inc. v. Bailey*, 108 S. Ct. 2831 (1988) (White, J., dissenting from denial of cert.); *see also Mascuilli v. United States*, 383 F. Supp. 50

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the award and dismissing the writ of error, this Court per Mr. Justice Holmes stated that interest would run from the date of the original decree even though the husband had, through his appeal, succeeded in *reducing* the award:

> [T]hat was the date at which *but for delays of the law* the wife would have received her dues, the husband has had the use of the money meanwhile, and we are not prepared to say that it was not at least within the discretion of the court to allow the charge, *notwithstanding the success of the husband in reducing the amount on appeal.*

241 U.S. at 159 (emphasis added).

[31] *1st Cir.: United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875 (1st Cir. 1971);

2d Cir.: Smith v. National Railroad Passenger Corp., 856 F.2d 467 (2d Cir. 1988);

3d Cir.: Poleto v. Consolidated Rail Corp., 826 F.2d 1270 (3d Cir. 1987);

4th Cir.: The Kia Ora, 252 Fed. 507 (4th Cir. 1918);

5th Cir.: Nissho-Iwai Co. Ltd. v. Occidental Crude Sales, Inc., 848 F.2d 613, 624 & n.9 (5th Cir. 1988);

6th Cir.: Bailey v. Chattem, Inc., 838 F.2d 149 (6th Cir.), *cert. denied*, 108 S. Ct. 2831 (1988);

7th Cir.: Graefenhain v. Pabst Brewing Co., 870 F.2d 1198, 1211 (7th Cir. 1989); *Merit Ins. Co. v. Leatherby Ins. Co.*, 728 F.2d 943, 945 (7th Cir. 1984) (per curiam);

8th Cir.: Buck v. Burton, 768 F.2d 285, 287 (8th Cir. 1985);

9th Cir.: Turner v. Japan Lines, Ltd., 702 F.2d 752 (9th Cir. 1983);

10th Cir.: Northern Natural Gas Co. v. Hegler, 818 F.2d 730, 737-38 (10th Cir. 1987), *cert. dismissed*, 109 S. Ct. 28 (1988);

11th Cir.: Georgia Association of Retarded Citizens v. McDaniel, 855 F.2d 794, 799 (11th Cir. 1988);

Fed. Cir.: Mathis v. Spears, 857 F.2d 749, 760 (Fed. Cir. 1988).

(E.D. Pa. 1974), *aff'd without opinion*, 519 F.2d 1398 (3d Cir. 1975).[32]

3. Practice In The Lower Courts And The Policies Behind Interest Awards Support Interest From The Original Judgment

Neither 28 U.S.C. §1961, for routine interest on execution of District Court judgments, nor Fed. R. App. P. 37, for interest awards by Courts of Appeals, provides explicit guidance on the date from which interest should be calculated in cases such as the present one in which there are multiple judgments recalculating the amount of damages.[33]

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[32] In *Mascuilli*, some six years *after* the 1968 liability judgment, the District Court, in March 1974, entered a revised damage award for plaintiff in the increased amount of $132,665.

Concluding that the District Court's final *liability* judgment of 1968 constituted the appropriate starting point for the running of interest on the damage award, the Court declared:

> [Plaintiff] became entitled to interest as of the day the final judgment on liability was rendered [in 1968], *and it would be inequitable to impose the costs associated with the use of money on her rather than on the defendant whose wrongful conduct resulted in the invocation of the judicial process and who had use of the money during the pendency of the various appeals.*

Mascuilli, 383 F. Supp. at 53 (citations omitted).

[33] The statutory provision in 28 U.S.C. §1961 mandates that interest shall be calculated "from the date of the entry of the judgment." 28 U.S.C. §1961, unfortunately, does not specify which "judgment" begins the running of interest in the event of multiple judgments recalculating the amount of damages. *See Turner v. Japan Lines, Ltd.*, 702 F.2d 752, 754 (9th Cir. 1983). Under equitable interpretation of the statute, the date from which interest runs can be different from the date of the final judgment vesting plaintiff's right to receive interest. *See* Reitz, J.A. 216, 238; Court of Appeals Opinion, Pet. A-17, A-22.

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As discussed in the section on POWER TO AWARD that follows, there are a number of formulations of the Courts of Appeals' power to grant appropriate interest:

(1) inherent or equitable power of the court;
(2) interpretation of 28 U.S.C. §1961 according to the "equity of the statute"; or
(3) interpretation and application of Fed. R. App. P. 37, independent from, or in conjunction with, 28 U.S.C. §1961.

But irrespective of these nuances, the policy behind court awarded interest dictates a very simple rule, – which would be dispositive of this case, and would provide proper guidance for all other courts in which this issue might arise – *i.e.*, that:

> interest on a judgment should run from the date of the original judgment entered in favor of the judgment creditor, *unless subsequent recalculation of damages accounts for the time value of money after the date of the original judgment.*

See, e.g., Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282, 1299-1300 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985).[34]

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Fed. R. App. P. 37 does not specify the appropriate date for commencement of interest in a case such as the present one in which the original liability finding is affirmed but the final judgment of the District Court is modified. This rule allows the court to award interest from the original judgment in favor of a plaintiff as long as there is no double counting of both prejudgment and postjudgment interest for the same period. *E.g., James B. Lansing Sound, Inc. v. National Union Fire Ins. Co.*, 801 F.2d 1560, 1569-1571 (9th Cir. 1986).

If a subsequent calculation of damages does not include an increment accounting for the time value of money after the date of the original judgment, then interest should be awarded from the date of the original judgment. *E.g., Handgards*, 743 F.2d at 1299-1300.

[34] In *Handgards*, the Ninth Circuit upheld a District Court award of postjudgment interest in an antitrust case for the period between an

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This rule, which has been noted by Mr. Justice White,[35] is the majority rule among the Circuits, in cases in which there have been multiple recalculations of damages and the judgment amount,[36] and is consistent with the purpose of court awarded interest:

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original judgment and a new judgment on retrial, in circumstances similar to those in the present case. The Ninth Circuit held:

> Where . . . [interest for the period between two judgments] has not been included in damages, it can be recovered as postjudgment interest.

743 F.2d at 1300.

[35] *Chattem, Inc. v. Bailey*, 108 S. Ct. 2831, 2832 (1988) (White, J., dissenting from denial of certiorari) (noting cases allowing the prevailing plaintiff "postjudgment interest from the date of the original judgment in his favor").

[36] *1st Cir.: United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875, 876-77 (1st Cir. 1971) (interest should run from the original liability judgment of June 30, 1969 – even though treble damages assessed on that date had been vacated and subsequently recalculated).

3d Cir.: Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897, 927 (3d Cir. 1985).

5th Cir.: Nissho-Iwai Co. v. Occidental Crude Sales, Inc., 848 F.2d 613, 624 & n.9 (5th Cir. 1988); *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1983) (en banc) (fee award should bear postjudgment interest on the increased amount of $244,687.50 from the date of the original award of $45,000).

6th Cir.: Bailey v. Chattem, Inc., 838 F.2d 149 (6th Cir. 1988) (interest should run from October 27, 1980 judgment, despite an intervening appeal which had vacated the damage assessment and remanded for retrial of damages), *cert. denied*, 108 S. Ct. 2831 (1988); *United States v. Bank of Celina*, 823 F.2d 911, 914-915 (6th Cir. 1986) (interest over period of delay in District Court).

7th Cir.: Graefenhain v. Pabst Brewing Co., 870 F.2d 1198, 1211 (7th Cir. 1989).

8th Cir.: Total Petroleum, Inc. v. Davis, 822 F.2d 734 (8th Cir. 1987) (postjudgment interest should run from the date of original judgment but

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¶ *First*, because it compensates for the time value of money between two judgments *only* if the calculation of the subsequent judgment does not already account for the time value of money.

¶ *Second*, failure to award interest for the period between two judgments in these circumstances would improperly impose the cost of delay on the innocent victim rather than the adjudicated wrongdoer where liability has already been established and remains undisturbed, as in the present case.[37]

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on principal amount ultimately determined later after resolution of amount of set off).

9th Cir.: Handgards, 743 F.2d at 1299-1300.

10th Cir.: Compare Northern Natural Gas Co. v. Hegler, 818 F.2d 730, 737-38 (10th Cir. 1987) (postjudgment interest should commence as of the original judgment in 1974, despite reversal and recalculation of damages, where difference between the first and second judgment did not go to any basic issues of liability, but merely was a matter of recalculating damages), *cert. dismissed*, 109 U.S. 28 (1988), *with FDIC v. Rocket Oil Co.*, 865 F.2d 1158, 1161-62 (10th Cir. 1989) (where the original judgment was reversed on basic liability issues – there had never been any verdict or judgment in favor of plaintiff until the reversal on appeal – postjudgment interest should not run from District Court judgment in favor of defendant reversed on appeal).

[37] In *Handgards*, the original judgment was vacated in its entirety and subsequently retried for both liability and damages. *See also Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir.), *cert. denied*, 459 U.S. 1009 (1982); *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980).

The present case, however, presents an even *more compelling* basis for an award of interest over the entire period between the 1979 judgment and the 1981 judgment, because the *1979 judgment as to liability was never disturbed or overturned and was affirmed by the Court of Appeals in 1984*.

The District Court allowed a retrial limited to damages only, at Kaiser's request, and the second jury reaffirmed the damages by awarding

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¶ *Third*, as a matter of judicial administration, failure to award interest for the period between judgments would unduly encourage post-trial motions and appeals rather than the prompt and efficient resolution of disputes.

4. The Third Circuit Failed To Apply The Proper Standard For Determining When Interest Begins To Run And Erred By Denying Plaintiffs 2-1/2 Years Of Interest

Finally, we point out below, how and why, in our respectful submission, the Court below erred in its denial of 2-1/2 years of interest:

First, it failed to address the purposes behind interest awards and failed to follow the majority rule,[38] including a recent case in its own court, *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 927 (3d Cir. 1985), which properly allows such interest.

Moreover, the stated basis for the denial of 2-1/2 years interest is entirely without substance and is partially based on an incorrect reading of dispositive precedent.

In *Institutionalized Juveniles*, the Third Circuit had remanded a fee award for recalculation, but held that interest on that award under 28 U.S.C. §1961 should be calculated on the amount of the award ultimately established on remand, with interest beginning to run *from the date of the original award* below, not from the date of the recalculation. *Id.* at 927. The panel opinion's stated reasons for distinguishing this case from *Institutionalized Juveniles*, based on whether a particular judgment was "modified," "vacated" or "vacated in part," place form over substance and ignore: (1) that the second jury emphatically reaffirmed the damage

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an even higher amount. As in *Handgards*, the higher amount *did not reflect any increase based on the time value of money between the two awards*, and accordingly interest over that period is appropriate.

[38] *See Chattem Inc. v. Bailey*, 108 S. Ct. 2831, 2832 (1988) (White, J., dissenting from denial of certiorari).

award first assessed in 1979 and (2) that the 1979 liability finding was *never* reversed and formed the basis for the damage award.[39]

As this Court stated in *Kneeland v. American Loan & Trust Co.*, 138 U.S. 509, 511-512 (1891), in affirming the award of interest from the date of an original decree, rather than the date of recalculation of the amount of the award:

> Equity regards the substance and not the form. The rights of the parties are not to be sacrificed to the mere letter, and whether the language used was reversed, modified, or affirmed in part and reversed in part, is immaterial. Equity looks beyond these words of description to see what was in fact ordered to be done.

The Third Circuit also erred in ignoring the dictates of equity, and the emphatic reaffirmance of the damage award upon its recalculation at Kaiser's request.

Finally, the court below erred in purporting to distinguish *Handgards* by incorrectly describing that case as "holding that plaintiff is entitled only to postjudgment interest from the date of the first judgment to the date of the second judgment

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[39] The court below suggested that the present case was different from *Institutionalized Juveniles* because that case involved the court's "modifying a judgment." 865 F.2d at 751 n.6, Pet. A-12 n.7. The court in *Institutionalized Juveniles*, however, *did not* simply "modify" the District Court judgment. The judgment was "vacated in part, and the case remanded for further proceedings." 758 F.2d at 927. The District Court was directed to recalculate the fee award and then grant "postjudgment interest * * * on the amount of the recalculated award *from the date of its original order* awarding the fee." *Institutionalized Juveniles*, 758 F.2d at 927 (emphasis added).

Similarly, in the present case, interest should run on the recalculated judgment amount from the date of the original judgment in favor of Plaintiffs. *Cf. Black Grievance Committee v. Philadelphia Elec. Co.*, 690 F. Supp. 1393, 1406 (E.D. Pa. 1988) ("Defendant argues that the present case differs from *Institutionalized Juveniles* because the District Court fee award was vacated only in part in that case, while it was vacated in its entirety in the case at hand. *Defendants' argument is specious.*")(emphasis added).

because the claim was not liquidated until the first judgment." 865 F.2d at 571 n.6, Pet. A-12 n.6.[40] The Ninth Circuit in *Handgards* specifically held that the plaintiff *was entitled* to postjudgment interest over the period between the first and second judgments, just as Plaintiffs in the present case are requesting interest between the first and second judgments in their favor. *Id.* at 1299-1300 & n.28.[41]

The Court of Appeals' decision, in denying almost 2-1/2 years interest, by failing to award interest back to August 22, 1979, is at odds with the foregoing precedent and conflicts with the basic policy behind the federal interest statute and the federal antitrust laws. Plaintiffs, whose damages were measured as of May 31, 1977,[42] are entitled to interest from August 22, 1979 when they established Kaiser's liability for destroying their business and first obtained a multimillion dollar judgment in their favor.

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[40] The Third Circuit was incorrect to the extent it suggested the court in *Handgards* limited the plaintiff in that case to interest over the period between the two judgments. There was no dispute that plaintiff *was entitled* to interest after the second judgment. *See Handgards*, 743 F.2d at 1298.

[41] See discussion in II B that follows where we review the cases that have dealt with the *amount of principal* on which interest runs, where there has been a *re*-calculation of the award.

[42] In the present case, like *Handgards*, the increased amount of the judgment on retrial was not the result of any accounting for the time value of money between the dates of the two judgments. In both the 1979 trial and the 1981 damage trial, Plaintiffs' theory of damages remained the same: the damages were valued as of May 31, 1977. *Compare* J.A. 149, 157-167 (1981 damage trial), *with* J.A. 90, 126 (1979 damage trial). *See also* J.A. 129 (1981 Pretrial Statement on Damages).

B. *THE PRINCIPAL AMOUNT ON WHICH INTEREST RUNS:* Where Two Or More Successive Damage Awards Are Based On The Same Liability Finding, The Majority And Better Rule Is That Interest Runs On The Amount Of The Award Finally Determined To Be Correct, And As Of The Date Liability Was Established

Award is Decreased: Where there has been a *re*-calculation of a damage award, based on a single finding of liability, and the award is subsequently *reduced*, all courts agree, and we submit rightly, that interest runs from the original finding of liability, but *only* on the reduced award as ultimately determined to be correct as of the date of liability. *See, e.g., De La Rama*, 241 U.S. at 159-160 quoted at pp. 20-21 n.30. *See also* p. 21 n.31.

Award Is Increased: Similarly, where the award is subsequently *increased*, the courts are in agreement that interest on some amount of principal runs from the date liability first attached. Three circuits, however, apply only a *step-up* (i.e., principal on which interest runs stepped up to the higher amount only as of the date of the increase). *Bailey v. Chattem, Inc.*, 838 F.2d 149, 154 (6th Cir. 1988), *cert. denied*, 108 S. Ct. 2831 (1988); *Handgards, Inc. v. Ethicon, Inc.*, 552 F. Supp. 820, 821-22 (N.D. Cal. 1982), *aff'd*, 743 F.2d 1282 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985); *Chemical Bank & Trust Co. v. Prudence-Bonds Corp.*, 213 F.2d 443 (2d Cir.), *cert. denied*, 348 U.S. 856 (1954).

On the other hand, the majority, and we submit better rule, holds that interest on the increased amount goes back to the date liability was originally fixed. *Northern Natural Gas Co. v. Hegler*, 818 F.2d 730, 737-738 (10th Cir. 1987), *cert. dismissed*, 109 S. Ct. 28 (1988); *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 927 (3d Cir. 1985); *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1983) (en banc); *United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875 (1st Cir. 1971); *The Kia Ora*, 252 Fed. 507 (4th Cir. 1918); *Black Grievance Committee v. Philadelphia Elec. Co.*, 690 F. Supp. 1393, 1405-06 (E.D. Pa.

1988); *Mascuilli v. United States*, 383 F. Supp. 50 (E.D. Pa. 1974), *aff'd without opinion*, 519 F.2d 1398 (3d Cir. 1975); *cf. Mathis v. Spears*, 857 F.2d 749, 760 (Fed. Cir. 1988).

Logic, fairness and the rule we urge this court to establish supports the latter rule.[43] The latter rule is proper because it is the event of establishing liability, not the quantification of damages, that establishes the existence of a debt owed by a defendant to a plaintiff. The date of quantification of damages is only relevant if delay damages or prejudgment interest is computed into the judgment as of that date. And that is precisely why the second sentence of Fed. R. App P. 37 gives broad authority to the Courts of Appeals to give appropriate "instructions" regarding the allowance of interest when it reinstates an earlier judgment.[44]

Thus, regardless which formulation this Court ultimately adopts, the court below erred in denying Plaintiffs *all* interest during the 2-1/2 years of delay. For the reasons advanced above, we urge this Court to hold that interest runs over the entire period from when liability attaches, and on the amount of the award finally recalculated to be correct as of that date.

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[43] *Cf.* Note, *Interest On Judgments In The Federal Courts*, 64 Yale L.J. 1019, 1042 n.118 (1955) ("Of course, an appellate court when increasing a lower court's award may order that interest run on the total amount of the final judgment from the date of the first judgment. In doing so * * * the appellate court is awarding interest in the exercise of its discretionary power to award proper relief, not deciding what §1961 allows."). (citations omitted).

[44] See discussion below pp. 40-41.

C. *POWER TO AWARD*: The Courts Of Appeals Have The Power (Inherent, Equitable And Under Fed. R. App. P. 37) To Award Interest At Commercial Free Market Rates Where Minimum Interest Mandated Under 28 U.S.C. §1961 Is Inadequate To Preserve The Value Of The Judgment

1. *INTRODUCTION*: Federal Court Power To Award Adequate Interest

Given the history and purposes of interest on court judgments discussed above,[45] any diminution in the value of the judgment due to failure to adequately account for the time value of money would be contrary to the policy behind interest awards and the federal antitrust laws.

As stressed in this brief,[46] T-bill rates, as provided for under 28 U.S.C. §1961, in routine interest calculations by District Court clerks on judgments in their courts, are significantly below commercial market rates (prime, compounded monthly): Thus, in the present case, if interest was properly calculated from the 1979 finding of liability, the shortfall between interest at market rates ($18.6 million) and interest at the fixed T-bill rate ($11.9 million) over the same period amounts to a windfall to Kaiser and a corresponding shortfall to Plaintiffs of some $6.6 million (35.8% of the market rate interest), and a diminution of 23% of its total award of principal and interest.

It is in this setting that this Court must interpret the inherent and equitable power of the Courts of Appeals to award adequate interest, as well as Fed. R. App. P. 37, and 28 U.S.C. §1961.

As noted below (pp. 32-40), the inherent and equitable power of the courts to resolve cases, grant the courts power, in a case such as this, plagued as it has been by extraordinary

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[45] See Section I above, pp. 13-17, discussing the history and fourfold purposes of interest.

[46] *See* Statement of Case, B-4, pp. 7-8, and discussion below pp. 41-46.

delays, to award interest at market rates from the original judgment on August 22, 1979. The court below erred in failing to recognize and act upon this inherent and equitable power. *See* pp. 41-46.

Moreover, Fed. R. App. P. 37 reaffirms the power of federal appellate courts to award adequate market interest as part of their mandate, in cases such as this one, where the December 27, 1984 judgment in Plaintiffs' favor, affirmed the August 1979 liability finding and modified upwards the January 17, 1983 final judgment of the District Court. *See* pp. 40-41.

Where the minimum amount of interest mandated under 28 U.S.C. §1961[47] is not adequate to preserve the value of the judgment, the courts have the power, authority and duty to award adequate interest. That authority and duty are particularly acute in cases such as this one where the delay in collection was due solely to stays of execution obtained by the defendants, and the ultimately unsuccessful post-trial proceedings, initiated by the defendants to challenge the jury's verdicts and judgments of the court.

2. *INHERENT POWER, ITS ROOTS*: Federal Courts Have Inherent Power To Award Adequate Interest To Preserve The Value Of Judgments In Their Courts

Federal courts have inherent power and authority[48] over matters essential to the administration of justice and essential

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[47] The Act of 1842, 28 U.S.C. §1961, merely mandates the minimum "floor" amount of interest that must be awarded as a matter of course on all judgments entered in federal District Courts, and which may be calculated by the clerk and included in the amount collected on the judgment through a writ of execution levied by the federal marshal. *See* pp. 34-35.

[48] It is beyond question that the federal courts have inherent powers vested in them upon their creation. *See United States v. Hudson*, 7 Cranch (11 U.S.) 32, 34 (1812); *Anderson v. Dunn*, 6 Wheat. (19 U.S.) 204, 227 (1821); *Ex parte Robinson*, 19 Wall. (86 U.S.) 505, 510 (1873); *Michaelson v. United States*, 266 U.S. 42, 66 (1924); *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630 (1962).

for the functioning of the judiciary, *Levine v. United States*, 362 U.S. 610, 615-616 (1959); *see also Michaelson v. United States*, 266 U.S. 42, 65-66 (1924); *Myers v. United States*, 264 U.S. 95, 103 (1924), as well as "inherent power" to enforce their orders and judgments and preserve and ensure the full efficacy of the relief they order.[49]

As a basic matter of judicial administration essential to the proper functioning of the judiciary, federal courts have the power to stay execution of their judgments pending post-trial motions and appeals and award interest to the judgment creditor over the period the stay is in effect.[50] The power to stay proceedings pending appeal is "inherent" and cannot be limited even by a statute providing that an appeal shall not act as a stay.[51] *In re McKenzie*, 180 U.S. 536, 550-51 (1901); *see also Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9-10 (1942); *In re Claasen*, 140 U.S. 200, 205 (1891).

The inherent power to compensate a judgment creditor for delay in execution on a judgment[52] is just as much a part of the court's "traditional equipment for the administration of justice" (*Scripps-Howard*, 316 U.S. at 9-10), as the power to

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[49] *See, e.g., Ex parte Peterson*, 253 U.S. 300 (1920); *see also* Fed. R. Civ. P. 69 & p. 34 & n.53 below.

[50] *See* 28 U.S.C. §2101(f); S. Ct. R. 44; Fed. R. App. P. 8, 41; Fed R. Civ. P. 62.

[51] The power of the Congress to regulate matters within the inherent power of the courts is limited by constitutional principles of separation of powers and by the constitutional grant of jurisdiction to the federal courts in Article III. *See generally United States v. Klein*, 13 Wall. (80 U.S.) 128, 147 (1871); Levin & Amsterdam, *Legislative Control Over Judicial Rule Making: A Problem Of Constitutional Revision*, 107 U. Pa. L. Rev. 1, 30 (1958); Frankfurter & Landis, *Power of Congress Over Procedure In Criminal Contempts in "Inferior" Federal Courts – A Study In Separation of Powers*, 37 Harv. L. Rev. 1010, 1017-22, 1049 (1923); 2 G. Haskins & H. Johnston, *History of the Supreme Court of the United States* 612-13 (1981).

[52] *See* Note, *Interest On Judgments In The Federal Courts*, 64 Yale L.J. 1019, 1042 n.118 (1955) (appellate court "discretionary power to award proper relief"); *cf. Laudenberger v. Port Auth.*, 496 Pa. 52, 60-67, 436 A.2d 147 (1981) (court power over delay damages), *appeal dismissed*, 456 U.S. 940 (1982), *superseded by amended Rule 238*.

stay execution. Both are intended to prevent "irreparable injury to the parties" (*id.* at 9) – such as, in the present case, erosion of the value of the judgment during the appeals process.

Thus, ever since the Judiciary Act of 1789, which first created the lower federal courts, the federal appellate courts have had the power to award interest. Judiciary Act of 1789 sec. 23, 1 Stat. 85 (currently codified as amended at 28 U.S.C. §1912).

(a) Courts' Power To Award Interest Is Not Dependent Upon Authority From The Congress

The foregoing power under the Judiciary Act, and other inherent power, was vested in the courts upon their creation. It predates by some 50 years the federal statute for execution on federal District Court judgments with interest, enacted in 1842, currently codified, as amended, at 28 U.S.C. §1961.

The Act of 1842 was enacted to put federal courts on a par with state courts which generally allowed levy of execution for the judgment amount plus interest by statute and to avoid the cumbersome procedure of instituting a separate action in debt to recover full interest.[53] The Act specifically

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[53] As this Court noted in *Perkins v. Fourniquet*, 14 How. (55 U.S.) 328 (1852), "[u]pon common-law principles a judgment does not carry interest" but "damages may be recovered for the detention of the debt, in an action on the judgment." 14 How. (55 U.S.) at 331. *See also* Note, *Interest on Judgments in the Federal Courts*, 64 Yale L.J. 1019, 1019 n.4 (1955).

The abolishment of common law pleading rules, upon the adoption of the Fed. R. Civ. P. in 1938, effectively abolished any requirement that a judgment creditor institute a separate action in debt to recover interest or damages for the detention of the judgment amount. Indeed, Fed. R. Civ. P. 69 specifically set forth the power of federal courts to render effective relief "in proceedings supplementary to and in aid of a judgment" in accordance with the practice and procedure available under state law.

In order to afford complete and effective relief, a modern federal court of equity, operating under the Fed. R. Civ. P. and Fed. R. App. P. 37, has the power to, and should, award interest that could be recovered in any separate common law action in debt for detention of the judgment.

provided that District Court judgments would carry interest "by force of law" notwithstanding the failure of the court to order payment of interest on the judgment. *See Perkins v. Fourniquet*, 14 How. (55 U.S.) 328, 331 (1852). Even prior to its enactment, this Court upheld the power of the federal marshal to levy execution on the amount of federal court judgments, plus interest under state law. *Amis v. Smith*, 16 Pet. (41 U.S.) 303, 311 (1842).

Subsequent decisions of this Court clearly establish the power of the federal courts to award interest independent of any statutory authority granted by Congress. *See, e.g., West Virginia v. United States*, 479 U.S. 305, 308-09 (1987); *Billings v. United States*, 232 U.S. 261, 285-87 (1914); *National Bank of Commonwealth v. Mechanics' National Bank*, 94 U.S. 437 (1876).[54]

(b) The Statute for Interest In Execution On District Court Judgments (28 U.S.C. §1961) Does Not And Cannot Preempt This Court Or The Courts Of Appeals From Awarding Appropriate Interest To Preserve The Value Of Judgments

The Act of 1842 was specifically addressed to interest on judgments of federal District Courts and federal circuit courts. Shortly after its enactment, this Court specifically held that it does not govern judgments of the Supreme Court. *Mitchell v. Harmony*, 13 How. (54 U.S.) 115, 147-49 (1851); *Perkins v. Fourniquet*, 14 How. (55 U.S.) 328, 330-33 (1852).

Similarly, the Act of 1842, as amended and currently codified at 28 U.S.C. §1961, also does not apply to judgments

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[54] Some decisions of this Court have gone so far as to indicate that when a federally protected right – such as the freedom from monopolistic trade practices – is invaded, "federal courts may use any available remedy to make good the wrong done." *Cf. Bell v. Hood*, 327 U.S. 678, 684 (1946). *See also Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15-16 (1971).

of the federal Courts of Appeals.[55] The several Court of Appeals have power and discretion to award interest at market rates where appropriate to preserve the value of the judgment.[56] *See* 28 U.S.C. §1912; Fed. R. App. P. 37;[57] *cf. Briggs v. Pennsylvania R. Co.*, 334 U.S. 304 (1948) (ultimate power of Court of Appeals to provide in its mandate for appropriate interest); *Perkins v. Fourniquet*, 14 How. (55 U.S.) at 331-33 (power of the Supreme Court to award interest on its judgments independent of the authority of the Act of 1842, currently codified as 28 U.S.C. §1961).

3. *EQUITABLE POWER*: Federal Courts Have Equitable Power To Award Sufficient Interest To Preserve The Value Of The Judgment

(a) This Court's Precedent Dictates That Courts Should Award Interest As Warranted By Principles Of Equity And Justice

More than 100 years ago, this Court invoked equitable principles to justify an award of interest, notwithstanding the lack of any statutory authority for such an interest award. *Young v. Godbe*, 15 Wall. (82 U.S.) 562, 565-66 (1872). Four years later, in *National Bank of Commonwealth v. Mechanics'*

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[55] Subsection (c) enumerates certain courts' judgments that are covered by 28 U.S.C. §1961 in addition to the "District Court" listed in subsection (a). Subsection (c)(4) specifically declares, consistent with this Court's hundred-year-old interpretation of the statute, that: "This section shall not be construed to affect the interest on any judgment of any court not specified in this section."

Thus 28 U.S.C. §1961 does not limit the power of the Court of Appeals to grant adequate interest on its December 27, 1984 judgment.

[56] Indeed, Mr. Justice Harlan (the elder), albeit in dissent, once stated his view that legislative attempts to deprive litigants of interest could constitute a deprivation of property without due process of law. *Morley v. Lake Shore & M.S. Ry*, 146 U.S. 162, 177-178 (1892) (Harlan, J., dissenting).

[57] *See* below pp. 40-41.

National Bank, 94 U.S. 437, 439 (1876), this Court held that claims proved before the Comptroller of the Currency bore interest even though they had not been perfected as judgments of a court because they "are within the equity, if not the letter, of these statutes [providing for interest on judgments], and bear interest as judgments would have done."

As discussed above (pp. 14–15), this Court has repeatedly held that interest should be awarded whenever the principles of equity and justice dictate such an award. *See, e.g., Billings v. United States*, 232 U.S. 261, 285-288 (1914).

(b) The Courts Of Appeals' Equitable Power To Award Interest On Judgments Does Not Conflict With Any Act Of Congress

Although courts of equity justifiably are reluctant to act in a manner explicitly contrary to an act of Congress, the award of interest on judgments, to preserve the value of a treble damage award mandated by an Act of Congress[58]

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[58] As discussed below (pp. 41-46), full commercial rate interest is necessary to preserve the value of the trebled award mandated as an ample remedy and to carry out federal policy. The Clayton Act, under which this action was brought, expressly grants broad equity powers to the courts to protect private parties such as Plaintiffs. 15 U.S.C. §26.

Given the equity power expressly conferred by Congress, the Courts should not be reluctant to invoke equity to award adequate interest to preserve the full award mandated under the Act. *Cf. Porter v. Warner Holding Co.*, 328 U.S. 395, 397-98 (1946) (Emer. Price Control Act) ("the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command").

As this Court stated in *Porter*, "[r]estitution, which lies with that equitable jurisdiction * * * is within the recognized power and within the highest tradition of a court of equity." *Id.* at 402.

This Court has stressed that a federal court has the inherent power to fashion a remedy as the equities of a case require, even absent statutory authority for a given remedy. *See, e.g., Sprague v. Ticonic Bank*, 307 U.S.

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against diminution caused by delays in the judicial process, is a matter within the inherent power of the courts.

In the present case, there is no conflict between an act of Congress and the inherent power of the courts because 28 U.S.C. §1961 does not by its terms limit the courts' authority. Rather, it merely sets a minimum amount of interest that must be awarded on any District Court judgment and provides for levy of execution on the judgment amount, plus interest, without the necessity of any further court order awarding interest. It also serves as a "rule of convenience" for quick and easy calculations by the clerk's office, or agents of the parties.[59] It does not preclude a court of equity from awarding adequate interest to preserve the value of a judgment.

Although Courts of Appeals have generally been guided by the interest provisions of 28 U.S.C. §1961 in determining the time period and the rate of interest, they, quite properly, have not felt constrained to limit interest awards to the minimum amount mandated by that statute. Instead, they have generally employed equitable principles in any given case to preserve the value of the judgment against erosion over time. *See, e.g., Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270

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161, 164-67 (1939) (District Court may tax as costs, attorneys' fees to the prevailing party, even though statute authorizing the underlying action does not permit it); *Texas & N.O. R. Co. v. Brotherhood of Ry. & Steamship Clerks*, 281 U.S. 548, 569-70 (1930) (absence of statutory penalty does not prevent District Court from enjoining statutorily prohibited activity).

[59] The fixed T-bill rate provided in 28 U.S.C. §1961 as amended establishes a rule of convenience allowing attorneys and the courts to easily calculate the interest due on the thousands of judgments entered daily in the District Court.

As discussed below (p. 44 & n.71), the advent of the "computer revolution" has made calculation of interest, at more accurate fluctuating rates, just as easy as calculation at a *fixed rate*. Similarly, it is just as easy to calculate interest compounded monthly or daily as it is to calculate interest *compounded annually*. *See* Bowles & Wheland, *The Law of Interest; Dawn of a New Era?*, 64 Can. Bar Rev. 142 (1986).

(3d Cir. 1987); *Louisiana & Ark. Ry. Co. v. Pratt*, 142 F.2d 847 (5th Cir. 1944).

In addition to cases equitably extending the scope of coverage of §1961 (*National Bank*) and cases equitably extending the time period over which interest runs (*Poleto; Pratt*), the lower courts have also exercised equitable discretion in setting the *rate of interest*, notwithstanding the rate specified in 28 U.S.C. §1961.[60]

Moreover, the lower courts have recognized the courts' discretion to set an adequate postjudgment interest rate, where the court's equitable power, rather than 28 U.S.C. §1961, forms the basis for the award of postjudgment interest. *Brock v. Richardson*, 812 F.2d 121, 126 (3d Cir. 1987).[61]

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[60] For example, in *Northern Natural Gas Co. v. Hegler*, 818 F.2d 730, 738 (10th Cir. 1987), *cert. dismissed*, 109 S. Ct. 28 (1988), the Court of Appeals affirmed the District Court's exercise of discretion in setting reasonable rates for postjudgment interest following entry of the original judgment and remand on appeal, stating:

> It is apparent that commercial rates increased greatly during this period and the trial court had discretion to keep the rates *in accordance with the real world.* (emphasis supplied).

Cf. Devex Corp. v. General Motors Corp., 749 F.2d 1020, 1024 (3d Cir. 1984), *cert. denied*, 474 U.S. 819 (1985) (applying higher rate in amended Delaware law, notwithstanding contrary declaration by Delaware legislature, in order to advance "the policy underlying 28 U.S.C. §1961: compensation of the wronged party for loss of the use of money, in a changing economy . . . [reflecting] changes in the value of the use of money"); *Peterson v. Crown Financial Corp.*, 661 F.2d 287 (3d Cir. 1981) (prejudgment interest at market rates); *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, 842 F.2d 1466, 1479-80 (3d Cir.) (prejudgment interest), *cert. denied*, 109 S. Ct. 273 (1988).

[61] The Act of 1842 was originally interpreted to apply only to judgments at law, and not to decrees in equity. *Perkins v. Fourniquet*, 14 How. (55 U.S.) at 331. Although that distinction is of questionable significance after the merger of law and equity, several courts of appeals have reaffirmed the power of the federal courts to grant both prejudgment

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This Court has repeatedly recognized the equitable power of the federal courts to award interest where appropriate. The equities of this case warrant an award of interest from August 22, 1979 at commercial market rates of interest.

4. *POWER UNDER FRAP 37*: Fed. R. App. P. 37 Reaffirms The Power Of Federal Courts Of Appeals To Award Interest Adequate To Preserve The Value Of The Judgment

Finally, the Court of Appeals' inherent and equitable power to award interest to preserve the value of a judgment on remand is a matter within its power to issue its mandate;[62] – and is codified and embraced in Fed. R. App. P. 37.[63]

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and postjudgment interest on equitable awards based on the equity power of the court. *Brock v. Richardson*, 812 F.2d 121, 125-127 (3d Cir. 1987); *Donovan v. Sovereign Security, Ltd.*, 726 F.2d 55, 58 (2d Cir. 1984). In such instances the Third Circuit has suggested that the court has discretion to set the rate of both prejudgment interest and postjudgment interest, notwithstanding the rates of interest specified in 28 U.S.C. §1961 for postjudgment interest. *Brock v. Richardson*, 812 F.2d at 127.

This inherent equitable power of the courts to award adequate interest should apply both to actions at law and actions in equity following the merger of law and equity upon the adoption of the Fed. R. Civ. P. in 1938, just as 28 U.S.C. §1961 should properly now be interpreted to apply to both legal and equitable relief ordered by District Courts. *Cf. Ford v. Alfaro*, 785 F.2d 835, 842 (9th Cir. 1986).

[62] *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304 (1948); *cf. Perkins v. Fourniquet*, 14 How. (55 U.S.) 328, 331-33 (1852) (Supreme Court authority to award interest irrespective of §1961's predecessor).

[63] Prior to the adoption of the Fed. R. App. P. in 1968, all of the federal circuits had their own rules providing for interest, similar to this Court's current Rule 49. *See* Note, *Interest on Judgments in the Federal Courts*, 64 Yale L.J. 1019, 1024 n.21 (1955).

Fed. R. App. P. 37 (which was enacted pursuant to the Rules Enabling Act, 28 U.S.C. §§2071-2077) reaffirms the power of the Courts

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At least one federal Court of Appeals has modified its prior strict and narrow interpretation of §1961, holding that in light of Fed. R. App. P. 37, it has discretion to order interest running from the original judgment or verdict in favor of the judgment creditor. *Smith v. National Railroad Passenger Corp.*, 856 F.2d 467 (2d Cir. 1988).[64] The Second Circuit in *Smith* recognized that Fed. R. App. P. 37, (adopted as it was under the Rules Enabling Act[65]) superseded that court's prior interpretation of 28 U.S.C. §1961.

In sum, interest awarded on a judgment of a Court of Appeals whether pursuant to its inherent or equitable power, or under Fed. R. App. P. 37, is not subject to any arbitrary limits affecting *time period, rate of interest* or the *principal amount*, where awards have been recalculated after liability has been fixed. Interest should be adequate to preserve the value of the award below based on the economic reality of the cost of money to the litigants in the private marketplace.

D. *COMMERCIAL MARKET RATES*: The Value Of The Judgment In The Present Case Will Be Severely Diminished If Prime Rates Are Not Awarded

Kaiser does not dispute, nor could it, that the time value of money, *including its cost of money*, is set in the private marketplace; and that its cost of money throughout the relevant period was at prime or above. It is there that the courts

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of Appeals to issue with their mandates "instructions with respect to allowance of interest" in cases such as the present one in which the District Court's January 18, 1983 final judgment was "modified or reversed with a direction that a judgment for money be entered in the District Court." Fed. R. App. P. 37.

[64] *See also* cases cited in note 31 on p. 21.

[65] The Rules Enabling Act provides that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. §2072(b); *Smith*, 856 F.2d at 473.

should look to determine the appropriate rate of interest to vindicate the purposes of interest and preserve the value of a judgment.

Kaiser's Benefit And Plaintiffs' Loss From Delay

As noted in the Statement of the Case (see pp. 2-11), the critically relevant time periods from May 1977 to August 1979 and from August 1979 to December 1981 were marked by unusually high inflation and volatile interest rates.[66] Attempting to slow the economy and ease inflation, the Federal Reserve Bank at times drove the prime lending rate up above the 20% level. J.A. 303-308. Meanwhile, Kaiser continued to enjoy the benefits of its illegal monopoly and, has continued to delay for 10 years, through post-trial motions, appeals and petitions for certiorari, its final day of reckoning.

While the *prime rate* (data that is regularly reported by the Federal Reserve Bank[67]) accurately measures the time value of money to commercial businesses in the private market,[68] rates provided (for routine District Court judgments) by 28 U.S.C. §1961, as amended, *systematically undervalue* the market cost of money to business litigants in at least three major respects:

First, (2 to 3 points below prime): Federal Treasury bill rates, based as they are on short term borrowing of the United States government (which, as the most creditworthy of all

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[66] *Cf.* S. Homer, *A History of Interest Rates* at 3 ("The spectacular rise in interest rates during the 1970's carried many long-term market rates on prime credits up to levels never before reached or approached in our time.").

[67] The Federal Reserve Bank issues weekly Statistical Releases that include the monthly average prime and weekly average prime for the preceding month and week.

[68] *See* 1987 Annual Statistical Digest of the Board of Governors of the Federal Reserve System, at 56, 242.

debtors, commands a lower borrowing rate[69]), systematically undervalue the cost of money to private litigants by 2 to 3 points.[70]

Second, (interest compounded only yearly): The federal interest statute as amended in 1982, 28 U.S.C. §1961(b),

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[69] *See* Reitz, J.A. 231; *see also* 28 U.S.C. §6621 (taxpayers pay IRS Federal short-term rate plus 3 percentage points with substantial underpayments at 120% of that rate); *Union Pacific RR. Co. v. United States*, 11 Ct. Cl. 177 (1986) (discussing legislative history of the increase of interest rates on tax obligations noting that "[h]istorically the 6 percent interest rate was meant to be higher than the prevailing money market rate to encourage [prompt payment]").

[70] The original proposal for amendment of 28 U.S.C. §1961 provided for interest at prime rate on *all cases*. The Senate report to this bill recognized that a substantial increase in rates was needed to eliminate the incentive for delay in the Courts. *See* S. Rep. No. 97-275, 97th Cong. 2d Sess. 11, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 21:

> Under current law, the interest rate on judgments in the Federal courts is based on varying State laws and frequently falls below the contemporary cost of money. Part B of Title III sets a realistic and nationally uniform rate of interest on judgments in the Federal courts that would be keyed to the *prime interest rate* as determined by the Internal Revenue Service. *This eliminates an economic incentive which exists today for a losing defendant to appeal a judgment and accumulate interest on the judgment award at the commercial rate during the pendency of the appeal.* (emphasis added).

The *market rate* provision was changed, at the last moment, to the federal T-bill rate, at the request of then Budget Director David Stockman, who on behalf of the United States urged that the postjudgment interest rate not exceed the cost of money of the federal government. *See* 127 Cong. Rec. 29, 866 (1981); *see also Campbell v. United States*, 809 F.2d 563, 574-75 (9th Cir. 1987). Prior to amendment, the federal government paid only 4% interest on judgments. *Id.* at 567.

One Court of Appeals has actually ordered both pre- and postjudgment interest at "IRS prime rates," apparently confused or failing to recognize the last minute change in the statutory language quoted in its own opinion. *EEOC v. Guardian Poos, Inc.*, 828 F.2d 1507, 1512 & n.4 (11th Cir. 1987).

provides interest compounded only annually, whereas "interest on private loans is compounded at least on a monthly, and often on a daily basis." Reitz, J.A. 231; *cf.* 26 U.S.C. §6622 (daily compounding of interest on judgments in favor of the IRS); Note, *Interest on Judgments In The Federal Courts*, 64 Yale L.J. 1019, 1048 n.150 (1955); *see also* p. 7 n.11 above.

Third, (fixed not fluctuating rate): Finally, 28 U.S.C. §1961, as a rule of convenience, fixes a *single interest rate* on any given judgment based on the T-bill rate as of the date interest begins to run. This is in stark contrast to the free marketplace, which measures interest at floating rates.[71] Thus an award of interest at a fixed T-bill rate under 28 U.S.C. §1961, in an inflationary period such as the last twenty years, will undervalue the cost of money in the marketplace, unless a volatilely high fixed rate attaches on the date interest begins to run.[72]

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[71] Although short term loans are made at either fixed or floating rates, longer term loans tend to be made at floating rates based on prime in the private marketplace. *See* 1987 Annual Statistical Digest of the Board of Governors of the Federal Reserve Bank at 57 ($5.4 billion out of $7.1 billion of long term loans at floating rates).

[72] A perfect example of the arbitrary inequity of applying a fixed volatile T-bill rate is demonstrated by this case.

After the Court of Appeals directed that interest would only run from the date that the award was re-calculated, it became apparent that there was an incredible swing in the Treasury Bill rate, depending on whether the relevant auction setting the fixed rate of interest, was:

1. *The auction "settled" on November 5, 1981:* i.e., interest at 14.84% developing some $12 million of interest as of January 1988; or

2. *The auction "settled" on December 3, 1981:* i.e., interest at 11.58% developing only some $8 million of interest as of January, 1988.

Over the year from April 1981 to April 1982, the auction that settled on December 3, 1981 *was the only auction with a yield lower than 14%!*

On Plaintiffs' application for instructions in the mandate that the auction settled on November 5, 1981 provided the governing T-bill rate

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Although the systematic undervaluing of interest because of the three factors discussed above may be *de minimus*, as it relates to the routine short period of delay between entry of final judgments in the District Court, after exhaustion of all appeals until execution on the judgment,[73] the impact on the parties to the present case is so substantial that it cannot be ignored by a court of equity. The periods of delay were so long, and the deficiency in the amount of the interest award so great, that the Court of Appeals should have exercised its power to award market rate interest to preserve the value of the judgment.

Kaiser did not pay Plaintiffs any money until July 3, 1986, when it paid $9,567,939. Calculating interest on the $9,567,939 judgment amount from the date of the original August 1979 judgment (at monthly average prime rates, compounded monthly, accounting for a payment of $9,567,939 against principal on July 3, 1986), interest due amounts to $18,634,754. Adding this $18.6 million of interest to the approximately $9.5 million judgment amount, the total value of the judgment is in the range of $28 million.

Yet, Kaiser in an act of incredible greed seeks to limit its interest liability to two days of interest for a total of $1,223 (R. 537a). By such legerdemain it effectively detrebles a treble-damage judgment: from a value of $28 million to approximately $9.5 million. Such result is offensive to any sense of fairness or public policy; including national antitrust

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(14.84%), the Court of Appeals determined that the District Court should resolve this issue in the first instance. Pet. A-74.

Given the ease of measuring the true cost of money, no court of equity should feel bound by an arbitrary "rule of convenience" for routine judgments in district courts where $4 million of interest, turns upon a technical interpretation of a statute that has no bearing whatsoever on the actual diminution in the value of the judgment occasioned by court delays.

[73] Or similarly to a run-of-the-mill appeal that takes no longer than a year to resolve.

enforcement policy[74] and a wise judicial policy that seeks to eliminate any economic incentive to use the courts for delay. *See* pp. 15-17 below.

Furthermore, even though Kaiser knew, as of August 1979, that it was liable for treble damages for destruction of Plaintiffs' business, it never availed itself of its option under Fed. R. Civ. P. 67 to stop the running of interest.[75] Instead, it took every available opportunity to file extensive post-trial motions and appeals, repeatedly relitigating, – and losing – all of the many complex issues that are invariably presented in private antitrust litigation. Enough is enough:

- Kaiser – as a predatory monopolist – should not be permitted to benefit from its delay.
- Plaintiffs – the victims of Kaiser's predatory conduct – should not bear the cost of delay.
- Kaiser, after more than 15 years of litigation, should not be permitted to pay off a judgment measured in 1977 dollars in devalued funds.
- Kaiser, over the long course of this litigation, has continued to enjoy the monopoly, which it illegally protected, by driving Plaintiffs out of business, and it will continue for many years to enjoy such benefits in the future.
- Plaintiffs, on the other hand, lost their family-owned business and, in the prime years of their lives, which should have been spent in productive and rewarding enterprise, were forced to endure more than 15 years of bitter litigation, against a large and powerful monopolist, who brought unlimited resources to bear in contesting and relitigating each and every conceivable issue.
- Kaiser was entitled to its day – or rather its decade and a half – in court, and lost. Now it should pay the full measure of what has been determined Plaintiffs should receive.

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[74] See discussion above at pp. 16, 37 & n.58.

[75] See p. 20 & n.28 above.

CONCLUSION

For the reasons stated above, this Court should reaffirm the inherent and equitable power of the Court of Appeals and the power pursuant to Fed. R. App. P. 37 to award adequate interest to preserve the value of the judgment and should remand to the Court of Appeals with instructions to award interest on $9,567,939 at monthly average prime rates (as reported by the Federal Reserve Bank), compounded monthly, from August 22, 1979 to the date of full payment of all principal and interest.

Respectfully submitted,

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APPENDIX

OF

RULES AND STATUTES

1. Fed. R. App. P. 37 provides:

> Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the District Court. If the judgment is modified, or reversed with a direction that a judgment for money be entered in the District Court, the mandate shall contain instructions with respect to allowance of interest.

2. 28 U.S.C. §1961, as amended effective October 1, 1982, provides:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a District Court. Execution therefore may be levied by the marshal, in any case where, by the law of the State in which such Court is held, execution may be levied for interest on judgments recovered in the Courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.
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> (b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.

(c)(1)This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at the underpayment rate or overpayment rate (whichever is appropriate) established under section 6621 of the Internal Revenue Code of 1954.

(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal Circuit, at the rate provided in subsection (a) and as provided in subsection (b).

(3) Interest shall be allowed, computed, and paid on judgments of the United States Claims Court only as provided in paragraph (1) of this subsection or in any other provision of law.

(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.